

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC JOHN MEYER,

Defendant-Appellant.

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UNPUBLISHED

February 18, 2010

No. 290287

Kalkaska Circuit Court

LC No. 07-002916-FC

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

In these consolidated appeals, defendant pleaded guilty to two charges of first-degree criminal sexual conduct. Seven other, similar charges were dismissed, and the parties agreed that no additional charges involving these victims would be brought. The trial court sentenced defendant to concurrent terms of 40 to 60 years in prison. This Court granted defendant's delayed application for leave to appeal, and we now affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions involve two different victims. The first involved defendant's eleven-year-old daughter, who reported that she and defendant had repeatedly had penile, digital, and oral intercourse since she was five years old. Defendant admitted to numerous sexual contacts with his daughter, which additionally violated a no-contact condition of his probation from an unrelated prior offense. The other charge involved defendant's fifteen-year-old niece, who reported that she had had sexual encounters with defendant on six to eight occasions, beginning when she was thirteen; she said she complied because defendant threatened to tell her father that he had found her having sex with a boy.

Another of defendant's nieces, aged twenty-two at the time of defendant's sentencing, provided testimony at sentencing about being abused by defendant when she was aged eleven or twelve. She stated that after "years of mistreatment and abuse [defendant] finally tired of me and told me that I was past the point of his age preference by telling me that my breasts had matured too much and that he wasn't attracted to me anymore." Defendant was not charged with anything arising out of the latter niece's abuse. Defendant was offered the opportunity to have a hearing on the latter niece's claims, but he waived that opportunity.

Defendant's guideline minimum sentencing range was 135 to 225 months' imprisonment for each of his convictions, but MCL 750.520b calls for a minimum sentence of 25 years for a violation committed against a child under age 13 by an individual over age 17, effective May 29, 2006. The allegations pertaining to defendant's daughter spanned into October 2007. The trial court concluded that "the guidelines [do not] adequately take into account the depth and breath [sic] and time span of all these abuses," and it departed upward from the guidelines. Defendant appeals his sentence.

Under the sentencing guidelines, the trial court is required to impose a minimum sentence that is within the appropriate sentence range unless the court articulates a "substantial and compelling" reason for departing from that range. *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003). Substantial and compelling reasons are exceptional circumstances that are objective, are verifiable, and "keenly" or "irresistibly" grab the court's attention. *Id.* at 257-258. We review for clear error the court's factual determination that there exists some factor or factors justifying the departure. *Id.* at 264-265. We review de novo as a matter of law whether any factor is objective and verifiable, *id.*, meaning "that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). And we review for an abuse of discretion the trial court's determination that any factor is substantial and compelling. *Babcock*, *supra* at 264-265.

Initially, however, defendant first argues that the allegations made by his second niece should not have been considered at sentencing because the acts were not charged, he did not admit to them, and they were not proven beyond a reasonable doubt. As noted, defendant waived the opportunity he was given, as required by *People v Uphaus (On Remand)*, 278 Mich App 174, 183-184; 748 NW2d 899 (2008), to have a hearing on those allegations. Moreover, a sentencing court is allowed to consider the facts underlying uncharged offenses. *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994). The facts need not be proven beyond a reasonable doubt. In *Blakely v Washington*, 542 US 296, 301; 124 S Ct 2531; 159 L Ed 2d 403 (2004), the United States Supreme Court held that facts supporting a departure from a *maximum* sentence had to be admitted by the defendant or found by a jury beyond a reasonable doubt. However, *Blakely* applies to a maximum sentence that could be imposed, but not to a minimum sentence imposed as part of Michigan's indeterminate sentencing scheme. See *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). The trial court properly considered the second niece's allegations.

Defendant also initially argues that the trial court was required to file a departure form. This requirement was based on MCR 6.425(D)(1) and *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987), which required that reasons for departure had to be stated on a sentencing information report. MCR 6.425(D)(1) was amended, eliminating the need for a sentencing information report. In *People v Keith*, 480 Mich 1035; 743 NW2d 563 (2008), our Supreme Court issued an order indicating that this amendment eliminated "the requirement that the court complete a sentence departure evaluation report[.]"

Defendant generally alleges that some of the factors relied on by the trial court, such as the young ages of the victims, were already taken into account by the guidelines themselves. The trial court may base a departure on a factor contemplated by the guidelines if the trial court determines that the factor was given inadequate or disproportionate weight. *Babcock*, *supra* at

258 n 12. The trial court clearly found here that the guidelines gave inadequate weight to the ages of the victims; equally clearly, the ages of the victims were objective and verifiable. Likewise, the trial court found that the guidelines did not take into account the long time period during which defendant's abuses had taken place, which is also objective and verifiable. The court did not clearly err in determining that the sexual encounters took place on numerous occasions over a substantial period of time with different young girls. This observation was based on statements external to the judge's mind and was verified by the statements of the girls and defendant himself. Moreover, the pervasive nature of the sexual encounters does grab one's attention and, given the repeated instances, is of considerable worth in fashioning the length of the sentence. Thus, these reasons were objective, verifiable, substantial, compelling.

Defendant argues that even if the trial court's reasons for the departure are permissible, the trial court failed to justify the *extent* of the departure. We disagree. Under *People v Smith*, 482 Mich 292, 295; 754 NW2d 284 (2008), a court must not only provide substantial and compelling reasons for a departure, but must establish why the particular sentence is proportionate to the offense and the offender. We review the extent of a departure for an abuse of discretion. *Id.* at 300.

Defendant argues that the trial court's justifications for the departure were its subjective opinion that the acts were "wrong" or "so serious," that the trial court impermissibly sought to ensure that defendant would be too old to prey on more young girls when he was released from prison, and that the trial court failed to consider his lack of any significant prior criminal record, his good work record, and his service in the Air Force and National Guard. We disagree entirely. The trial court incorporated by reference portions of defendant's presentence investigation report (PSIR), which we have read and found to be as disturbing as the trial court promised. We would find it difficult to conclude that defendant's sentence was so disproportionate as to constitute an abuse of discretion simply based on the contents of the PSIR.

Additionally, however, there was ample objective evidence to support the trial court's obvious – if perhaps inartfully stated – belief that defendant was likely to continue to be a threat upon release. Defendant's contention that the trial court failed to articulate why it picked a specific number misses the point. The trial court reasonably concluded that a longer sentence was appropriate, and considering the disturbing and calculated manner in which defendant repeatedly abused and manipulated the young victims, there was ample concrete evidence that rehabilitation would be futile and that the future threat to young girls posed by defendant upon his release was not merely subjective or speculative. See *People v Horn*, 279 Mich App 31, 44-45; 755 NW2d 212 (2008). The trial court did not abuse its discretion in imposing a lengthier sentence based on the need to protect others.

We are also unpersuaded that the trial court abused its discretion by disregarding the positive aspects of defendant's life, stating that "[i]t's just not what you would expect . . . from an honorably discharged air force man and a good worker and so on. It's really the opposite." We are also not persuaded of error by virtue of the fact that defendant had a minimal prior criminal record, which the trial court took into consideration. These criminal acts were taking place over a long period of time. Defendant simply had not been caught. We note these are crimes that are by their nature secretive and not carried out in the presence of third parties, and therefore they commonly go undetected until a victim comes forward.

We conclude that the trial court adequately stated on the record objective and verifiable, and substantial and compelling, reasons for departing upwards from the sentencing guidelines; and we conclude that the trial court justified the extent of that departure. We do not believe that the trial court is required to explicitly and precisely justify each individual year by which it departs; it needs only provide enough justification to permit effective review. *Smith, supra* at 304. The trial court clearly explained the connection between its reasons for the departure and the extent thereof, and we find defendant's sentence proportionate to the seriousness of his conduct. *Id.* at 304-305.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Mark J. Cavanagh

/s/ Alton T. Davis